

IS THE FEDERAL CONSTITUTION ADAPTED TO  
PRESENT NECESSITIES, OR MUST THE  
AMERICAN PEOPLE HAVE A NEW ONE?

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There have always been two rival and divergent views of the powers of the government under the Constitution: the first, that as to those subjects upon which Congress may legislate at all, its powers are exclusive; the second, that certain of its powers may be exercised concurrently with the several states; to these may now be added a third, that the states may pre-empt the subjects over which their control shall be exclusive. The Constitution is appealed to as furnishing the basis for all these theories, and it is a common thing for advocates of each, to quote as supporting their views, the well-known panegyric of Gladstone, who said that just "as the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man."

The American people have lived, have been governed, have progressed and achieved great things under this marvelous document in the one hundred and twenty years since its adoption. But we are now facing new problems; some of them more difficult than any which have hitherto called for solution; and if the American Constitution means what some of its professed adherents insist it means, and if it does not give the Federal Government power to deal with existing conditions which closely affect our national life, it has ceased to be adapted to the needs of this people, and the great Englishman would himself be probably the first to confess that our Constitution, though produced by the keenest intellects and most ardent patriots ever summoned to such a task, has finally been found wanting in the very particular which inspired the Federal compact.

The Confederation had proven a rope of sand; and only through the patriotism and high purpose of Washington did the Revolution result in victory to the ragged, tired American forces. After the surrender of Cornwallis at Yorktown the efforts to establish credit abroad and tranquility at home were unsuccessful. Even before the Revolutionary Army had disbanded, in a letter known as Washington's legacy to the American people, he insisted upon four things which were essential to the existence of the United States as an

independent power. Of these essentials, but two need be here noticed:

The first: "An indissoluble union of all the states under a single Federal government which must possess the power of enforcing its decrees."

The last: "The people must be willing to sacrifice, if need be, some of their local interests to the common weal; they must discard their local prejudices and regard one another as fellow-citizens of a common country with interests in the deepest and truest sense identical."<sup>1</sup>

The commercial and political rivalry between the states was sharp: the civilization they severally enjoyed differed in degree: the separation of the people was complete and their isolation so great as to be almost beyond our comprehension. There were no steamboats; no railroads; it took a week or ten days of uncomfortable and dangerous travel to go from Boston to New York, "and as the mails were irregular and uncertain and the rates of postage very high, people heard from one another but seldom."<sup>2</sup> It was impossible to raise a revenue to conduct a government. The states passed different traffic and tonnage acts and began to make commercial war upon one another. Connecticut and Pennsylvania quarreled over the valley of the Wyoming, and the story of the treatment of the unfortunate Yankees by the Pennsylvania legislature and militia is a chapter reciting the most cruel conduct ever charged against any of the American people except our treatment of the Indian tribes. The long and bitter dispute between New York and New Hampshire for the possession of the Green Mountains broke out afresh: the farmers and merchants of Rhode Island were in a fierce controversy with each other, and Shay's Rebellion occurred in Massachusetts. At this critical juncture, when anarchy seemed the doom of America, Washington conceived a project to connect the headwaters of the Potomac with the Ohio River and inspired the agreement between the states of Maryland, Virginia and Pennsylvania with reference to the proposed enterprise. From this modest beginning the Constitution was evolved.<sup>3</sup> And the regulation of commerce was the motive for the Federal compact.<sup>4</sup>

The student of constitutional history is familiar with subsequent events which resulted in the adoption of the Constitution. The

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1. Fiske: *Critical Period of American History*, 64.

2. *Id.* 73.

3. Fiske: *The Critical Period of American History*, 251; Kasson: *Evolution of the United States Constitution*, 40.

4. Kasson: *Evolution of the United States Constitution*, 138.

plan of the Federal Union, as proposed by the delegates from Virginia, which practically obliterated state lines and obliterated state rights, was substantially adopted except as modified by giving to the several states equal representation in the Senate. But it is not to be forgotten that even then there were men of undoubted patriotism, as they understood patriotism, in and out of the Constitutional Convention who bitterly opposed it, chiefly because it meant the surrender of divers powers which had always theretofore been exercised by the states.

James Wilson sought to have his associates take a larger view of the work in which they were engaged than the mere protection of local and transient interests. He said:

We should consider that we are providing a Constitution for future generations and not merely for the peculiar circumstances of the moment.<sup>5</sup>

Again he said:

I am lost in the magnitude of the object. We are laying the foundation of a building in which millions are interested, and which is to last for ages. . . . A citizen of America is a citizen of the general government and citizen of the particular state in which he may reside. The general government is meant for them in the first capacity; the state government in the second. . . . The general government is not an assemblage of states, but of individuals, for certain political purposes. It is not meant for the states, but for the individuals composing them. The individuals, therefore, not the states, ought to be represented in it.<sup>6</sup>

The Constitution was passed upon three compromises: The first, already referred to, was the concession of equal representation of the states in the Senate and the establishment of a national system of representation in the lower House. The second, which gave disproportionate weight to the slave states, gained their support. The third, the postponement for twenty years of the abolition of the foreign slave trade, secured absolute free trade between the states, with the surrender of all control over commerce into the hands of the Federal Government.<sup>7</sup>

This concession of absolute power to Congress over commerce so disgusted and enraged Randolph and Mason that they refused to sign the Constitution, and Mason remained its violent opponent.<sup>8</sup>

A letter drafted by the Convention to accompany the Constitution contained this statement:

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5. Vol. III, *Documentary History of the Constitution of the United States of America*, 440.

6. Kasson, 82.

7. Fiske: *The Critical Period of American History*, 317.

8. *Id.* 314, 403.

It is obviously impracticable, in the Federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest.<sup>9</sup>

The student of history will discover that the great-grandfathers of the present generation were past-masters of invective and vituperation, and it is apparent that the anti-Federalists of this day have borrowed some of the phrases and arguments of their great-grandfathers. But the Constitution was adopted and has been the foundation upon which the Federal Government has rested for one hundred and twenty years, in spite of the arguments urged against its adoption one hundred and twenty years ago, and which are now repeated in opposition to its adaptation to present conditions, as though these arguments were recent discoveries. The campaign for the Constitution was a calm, dispassionate appeal to patriotic reason, on the part of Washington, Hamilton, Madison, Wilson and other immortals who advocated its adoption, as against the abuse and violence of its opponents, which is copied in these days by some who boldly charge that the views of those who believe in a construction of the powers of the Federal Government under the Constitution and an exercise thereof, which shall permit it to fulfill its legitimate function, are unpatriotic if not treasonable. The question in the concrete involves the original controversy between the states and a central government and the surrender of the power of the states to the Federal Government in the interest of the common weal.

It was Madison who said:

The public good, the real welfare of the great body of the people, is the supreme object to be pursued. . . . No form of government, whatever, has any other value than as it may be fitted for the attainment of this object. Were the plan of the Convention adverse to the public happiness, my voice would be: Reject the plan. Were the Union itself inconsistent with the public happiness, it would be: Abolish the Union. In like manner, as far as the sovereignty of the states cannot be reconciled to the happiness of the people, the voice of every good citizen must be: Let the former be sacrificed to the latter.<sup>10</sup>

Wilson, in the early days of the Convention, made this statement:

On examination it would be found that the opposition to Federal measures had proceeded much more from the officers of the states than from the people at large.<sup>11</sup>

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9. Kasson, 197.

10. *The Federalist*, No. 45.

11. Vol. III, *Documentary History of the Constitution*, 28.

Later he said:

He did not see the danger of the states being devoured by the National Government. On the contrary, he wished to keep them from devouring the National Government.<sup>12</sup>

Again he said:

He conceived that, in spite of every precaution, the General Government would be in perpetual danger of encroachments from the State Governments.<sup>13</sup>

In this Madison agreed, and expressed the opinion "that there was (1) less danger of encroachment from the General Government than from the State Governments. (2) That the mischief from encroachments would be less fatal if made by the former than if made by the latter."<sup>14</sup>

It had for years been the vocation of those who framed the Federal Constitution "to make old laws conform to the changed conditions of life in the new world."<sup>15</sup>

The problem which we face at the present time is, whether or not the inspiration and vision of the fathers was broad enough to cover the conditions which have since developed in our national life. Military and naval power, a stable currency, the ability to pay debts, standing among the nations: all these we possess; and the Constitution admittedly confers powers in these respects which, in their legitimate exercise, serve us as well to-day as when the Constitution was adopted; but the commerce and general welfare clauses of the Constitution are in issue as much to-day as they ever were. They involve political as well as legal questions which are broader than mere criticisms of any particular administration.

But there is much confused thinking about these questions and much of the present discussion does not separate the political from the legal; or, in other words, the powers given by the Constitution are confounded with their exercise: the undoubted prerogative of Congress is mixed up in current thought and speech by those who ought to know better, with the assumption that the Supreme Court is to settle, not only what powers Congress has, but to what subjects these powers may be applied, and how the application shall be made. The Supreme Court has always disclaimed any such right. Just now it is the fashion for critics of the administration to inveigh

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12. Vol. III, *Documentary History of the Constitution of the United States of America*, 84.

13. *Id.* 179.

14. *Id.* 179.

15. President Rogers in Introduction to Ann Arbor Lectures on the *History of American Constitutional Law*.

against an assumed invasion of the rights of the people under their Constitution, through what are asserted to be unwarrantable extensions of Federal power. It is beyond the purpose of the writer to discuss either the criticisms of the administration or the vexed question of executive prerogative; but it is insisted that "the question up before the country now is not a question of the *existence* of power in the Federal Government, but only a question of the *right* and *just* use of its acknowledged powers. These two widely different things always have been confounded."<sup>16</sup> This question is not a legal question; it involves no constitutional "amendment by interpretation;" and the dangers which frighten those who oppose the tendency, aye, the intention, of the American people by legislation through Congress to assume exclusive control of the instrumentalities of interstate commerce are founded on local bias and have no existence save in the imagination. But the objection to this unmistakable and irresistible tendency and purpose lies deeper: it rests on a resurrected claim of the rights of the states as against the Federal Government; and when the people learn, as they rapidly are learning, the real drift of things, they will decide the present issues as they have all such others that have aroused political discussion for the last hundred years, in favor of that government which represents the people and not the states; for the people have a judgment which, as Mr. Justice Brewer says, "is the result of deliberate, well-considered thought."<sup>17</sup> In reaching their judgments, they are guided by the experience and wisdom which submits all questions to the pragmatic test. In our national experience, the attempted regulation by the states in many, if not all, matters that concern the people as a whole has not worked to the satisfaction of the people, and what the National Government has undertaken has worked!

It is not possible for the states to avoid the influence of local prejudice, sectional and commercial rivalry, and other tendencies towards disorganization and anarchy, and the people know it. That national spirit which knows no sectionalism and no state lines is but a sentimental mistake if the phantom of state rights is now to be stripped of its cerements and fleshed in respectability. Fortunately, this is not at present a partisan question. What a shaking up there will be if it reaches that stage!

It is said that "politics makes strange bedfellows." That old adage is well illustrated in the fact that the Republican governor

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16. Prof. Henry Scofield: *Illinois Law Review* for May, 1907, 32.

17. Two Periods in the History of the Supreme Court: An address delivered before the Virginia State Bar Association, August, 1906.

of a Western state, a Republican United States Senator from a state of the Central West, the Democratic governor from one of the Southern states, and the last two Democratic candidates for the presidency, are all apparently agreed in denying to Congress constitutional power to effectively and exclusively regulate the agencies and instrumentalities of interstate commerce, because, forsooth, it will take away certain rights and privileges which the states through their officers—not through their people—have asserted, without regard to the prerogative of Congress as fixed by the national Constitution.

“The powers of Congress are indeed enumerated; but it was intended that those powers thus enumerated should be effectual and not nugatory. In conformity to this consistent mode of thinking and acting, *Congress has power to make all laws which shall be necessary and proper for carrying into execution every power vested by the Constitution in the government of the United States or in any of its officers or departments.*”<sup>18</sup>

Moreover, the fathers had a dream of empire when they laid the foundations upon which this vast structure we call our national government has been built. Some of them, like Washington, Madison, Hamilton and Wilson, saw dimly, it is true, but nevertheless, with prophetic vision, the future greatness of the American government under a Constitution adapted to its needs; and because they avowedly were seeking to build a government for unborn generations, it is fair to assume that they intended the principles they stated in the Constitution to be applied to what should actually come to pass, even though they could not foresee present conditions.

For four thousand years the march and pressure of the race have been from the East towards the West. It did not require the spirit of prophecy to foretell one hundred and twenty years ago that the tides of settlement would surge with resistless energy over the low barrier of the Alleghany Mountains, on to the unexplored wilderness; and the frontier was pushed steadily toward the West beyond the Great Lakes, beyond the Mississippi and Missouri rivers, over the distant mountain ranges and beyond them, until there is no longer any West! The Great American Desert has been driven from the fertile plains of Nebraska and Kansas on past the Western slopes of the Rocky Mountains, towards the setting sun, in very truth a vagabond on the face of the earth. George Rogers Clark, the Moses of the Ohio Valley, saw the

Sweet fields beyond the swelling flood.

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18. 2 *Wilson's Works* (Andrews' Ed.), 59.

Then came the Louisiana Purchase, the Lewis and Clark Expedition, and the Astoria settlement followed, and thereafter was accomplished the gradual occupancy and settlement of the whole country west of the Alleghany Mountains. Never, since the dawn of history, were man and his opportunity so well met, and a continent has been transformed in two generations. The center of population in the United States has traveled westward at the average rate of five miles per annum for more than one hundred years, and is now in Southern Indiana.

The food of the nation is now all produced between the Wabash River and the Rocky Mountains, and the flocks and herds grazing over ten thousand hills and filling countless valleys from North Dakota to Texas fulfill their destiny in the packing-houses of Chicago, Omaha and Kansas City. The pony express and stage coach have given way to the trans-continental railway lines to meet modern needs; and thus new problems have arisen; and though the application of steam and electricity to transportation and industrial enterprises was unknown to the fathers, they, and their handmaidens, Insurance, are now indispensable agencies and instrumentalities of civilization and the commercial intercourse of men with each other, and are the means by which commerce is carried on among the states, even as navigation and the barter with which they were familiar, were the vehicles of commerce when the Constitution was adopted.

The Supreme Court has repeatedly recognized this development.

Marshall, the great expounder of the Constitution, who, though not a member of the Convention, took an active part in the campaign for its adoption in Virginia, characterized it as "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."<sup>19</sup>

Chief Justice Waite said of the powers granted to Congress by the commerce clause of the Constitution:

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances.<sup>20</sup>

Mr. Justice Miller said that the power of regulation under the commerce clause has been applied "to a method of intercourse which had no existence when the Constitution was framed."<sup>21</sup>

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19. *McCulloch v. Maryland*, 4 Wheat. 316, 413.

20. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9.

21. Lectures on the Constitution, 450.

Mr. Justice Brewer more recently said :

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing-vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and steamship. Just so it is with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.<sup>22</sup>

And Mr. Justice Brewer, in a late address, said :

For, after all, notwithstanding the independence of judicial tribunals, and however much at different times they may temporarily at least stay the action of the people speaking through the executive and legislative branches of the government, in the last analysis the court largely reflects the popular judgment, not its hasty opinion, but that which is the result of deliberate and well-considered thought. And yet the power of the Supreme Court in incarnating into the constitutional life of the nation the thoughts and purposes of the people, sometimes indeed going in advance of popular recognition, makes its action not only reflex, but also an indication of the development of popular government.<sup>23</sup>

Judge Amidon voiced the same thought when he said :

What is needed to-day is not that the constitution shall be construed to mean precisely what it meant to Marshall or to Miller, Field and Bradley, but that it shall be applied to present conditions by the same method and in the same spirit wherewith they applied it to the conditions of their times. In the performance of this, their highest duty, the Federal Courts are no part of the administration. They will not answer to its needs or its criticism. But they are a part of the nation, and in the past have responded, and ought always to respond to the deep, abiding organic changes in the national life.<sup>24</sup>

That profound student of the American Constitution, Mr. Bryce, says in substance that our Constitution has developed in at least three ways: by amendment, interpretation and usage; that the development *by usage* has established rules "not inconsistent with its express provisions, but giving them a character, effect and direction which they would not have if they stood alone."<sup>25</sup>

Again he says :

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22. *In re Debs.*, 158 U. S. 591.

23. *Two Periods in the History of the Supreme Court*: address delivered at a meeting of the Virginia State Bar Association August, 1906.

24. Address: *The Nation and the Constitution*, at the meeting of the American Bar Association at Portland, Maine, August, 1907.

25. I Bryce: *American Commonwealth*, 353.

The American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it, and therefore in its own spirit.<sup>26</sup>

The American people do not need a new Constitution. The one we have, thanks to the wisdom of the fathers, suffices; and even the commerce clause, without amendment either by adoption or interpretation, gives to Congress ample power, not only over commerce, but over every agency and instrumentality of commercial intercourse among the states. American commerce is the very heart and center of American civilization, and rapid transit, regular and quick mail service, the telegraph and telephone, have put all the people of the United States in touch with each other so that the commerce of the country is necessarily mostly interstate in character, and hence, subject to Federal regulation. And this, after all, is the vital question. Individual liberty and the pursuit of happiness are now assured to American citizens, and are not longer in issue, but it is of supreme importance that our commerce shall not be burdened nor impeded by state legislation, but that it shall be effectively controlled through Congressional action.

The commerce clause gives to Congress the power "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

Marshall thus defined commerce among the states:

The subject to which the power is next applied is to commerce "among the several states." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior.<sup>27</sup>

Commerce, therefore, is of two kinds. First, the commerce among the states; second, that commerce which is exclusively and completely internal and "is carried on between man and man in a state or between different parts of the same state." The word "among" is "restricted to that commerce which concerns more states than one." The completely internal commerce of a state is excluded from Federal control, but all other commerce is subject to Federal control.<sup>28</sup>

Whether a particular development and condition of commerce is interstate or intra-state is a question of fact. The fact ought not to

26. 1 Bryce; *American Commonwealth*, 389.

27. *Gibbons v. Ogden*, 9 Wheat. 1, 194.

28. *Gibbons v. Ogden*, 9 Wheat. 194, 195; *County of Mobile v. Kimball*, 102 U. S. 691; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460; *Howard v. Ill. Cent. R. R. Co.*, 28 Sup. Ct. Rep. 141.

be difficult to determine in any case, and could never be doubtful in any case except for the persistent political opposition to the extension of Federal control. The Supreme Court may determine the existence or absence of power invoked by any act of Congress: if power exists, the court may be trusted not to encroach upon the legislative prerogative, for there is no judicial barrier between Congress and the exercise of its powers.

According to Mr. Justice Miller, there are limitations even upon the power of the Supreme Court, and the learning and the patriotism of the great men who have composed it have effectually barred invasion by the court of the legislative and executive departments of the government. Mr. Justice Miller said:

The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.<sup>29</sup>

The Supreme Court is not given the power to regulate commerce. Nor is there any division of the subjects of commerce depending solely upon the pleasure or the judgment of the Supreme Court, into those which are subjects of state regulation and those which are subjects of Congressional control. The Constitution confides the power to regulate commerce to Congress and not to the Supreme Court.

Webster, arguing before the Supreme Court, said:

Congress, by the Constitution, is invested with certain powers, and as to the objects, and within the scope of these powers, it is sovereign.<sup>30</sup>

To the point that Congress is authorized to pass all laws necessary and proper to carry into effect the powers conferred, he said:

It is not enough to say, that it does not appear that a bank was not in the contemplation of the framers of the Constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is authorized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words, "necessary and proper," in such an instrument, are probably to be considered as synonymous. Necessarily, powers must here intend such powers as are suitable and fitted to the object; such as are best and most useful in relation to the end proposed. If this be not so, and if Congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation.<sup>31</sup>

The court held in that case:

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29. *Loan Association v. Topeka*, 20 Wall. 655, 663.

30. *McCulloch v. Maryland*, *supra*.

31. *McCulloch v. Maryland*, 4 Wheat. 316, 324.

If a certain means to carry into effect any of the powers, expressly given by the Constitution to the government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.<sup>32</sup>

The opinion contains this language:

But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.<sup>33</sup>

Shortly afterwards, the great chief justice said:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.<sup>34</sup>

The same idea was thus stated by Mr. Justice White:

No instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.<sup>35</sup>

It is too late to challenge the power of Congress over, or the propriety of Federal regulation of, any instrumentality of commerce. Time has demonstrated the correctness of Hamilton's declaration that the danger of usurpation by the Federal Government is not to be found in the nature or extent of the powers confided to it, but rather, if at all, in the composition and structure of the Federal Government itself.<sup>36</sup>

The question, therefore, is not as to the existence or the extent of the power, but whether the power is applicable to any given subject, whether transportation, the telegraph, insurance, or other interstate enterprises.

Mr. Justice Johnston said:

The language which grants the power as to one description of commerce grants it as to all.<sup>37</sup>

In speaking of the power of Congress over navigation, he said he did not regard it as a power *incidental* to that of regulating com-

32. *McCulloch v. Maryland* (quoting from syllabus).

33. *Id.*, 423.

34. *Gibbons v. Ogden*, 9 U. S. 1, 197.

35. *McCrary v. United States*, 195 U. S. 27, 54.

36. *The Federalist*, No. 31.

37. *Gibbons v. Ogden*, 9 Wheat. 1, 229.

merce, but he said: "I consider it as the thing itself; inseparable from it as vital motion is from vital existence."

"Commerce," said he, "in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce, the subject, the vehicle, the agent and their various operations, become the objects of commercial regulation. Ship-building, the carrying trade, and protection of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects would not possess power to regulate commerce."

Mr. Justice Field<sup>38</sup> said that the power to regulate commerce which is vested in Congress, "embraces within its control all the instrumentalities by which that commerce may be carried on *and the means by which it may be aided and encouraged*. The subjects, therefore, upon which the power may be exerted are of infinite variety." And yet the astonishing claim is made with respect to the two most common vehicles of interstate communication among the people, viz: the railroad companies and the insurance companies, that the states have rights of regulation which Congress must not invade by assuming supreme control.

The latest definition of commerce is that given by Mr. Justice Harlan in the Lottery Cases:<sup>39</sup>

Commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph.

Moreover, it is Congress and not the Supreme Court to whom the Constitution has confided the prerogative of determining what are and what are not subjects of interstate commerce. Congress has the exclusive power "to determine the articles which may be the subjects of commerce," said Mr. Justice Catron in the License Cases.<sup>40</sup>

Mr. Justice Field observed that: "What is an article of commerce is determinable by the usages of the commercial world."<sup>41</sup>

And Mr. Chief Justice Fuller said:<sup>42</sup>

We cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such.

38. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

39. 188 U. S. 321.

40. 5 How. 504, quoted by Justices Matthews and Field, in *Bowman v. Railway Co.*, 125 U. S. 465.

41. *Bowman v. Railway Co.*, *supra*.

42. *Leisy v. Hardin*, 135 U. S. 100, 125.

The real opposition to the exercise of Federal control over the instrumentalities of interstate dealings, otherwise interstate commerce, among the people of the United States, does not rest upon the absence of Congressional power, but rather in the disinclination to exercise it; for, as Mr. Justice Miller said,<sup>43</sup> one may count on his fingers those acts of Congress which have been held unconstitutional for want of constitutional power; and that disinclination, whether founded on selfish interest in preventing Congressional action, or a misconception of the structure and powers of government under the Constitution, raises a political and not a legal issue.

The supremacy of Congress acting within its powers was demonstrated by the circumstances of the Wheeling Bridge Company Case.<sup>44</sup> In that case, the Supreme Court declared the bridge across the Ohio River at Wheeling to be a nuisance because it was constructed in such manner as to obstruct navigation. This judgment of the Supreme Court, says Van Santvoord,<sup>45</sup> "was practically nullified by the subsequent act of Congress declaring the Wheeling bridge a *post road* of the United States."

This act, which is Chapter CXI of the Laws of 1852,<sup>46</sup> and which was passed after the decision of the Supreme Court of the United States, declared the bridge "across the Ohio River at Wheeling . . . (and others) . . . to be lawful structures in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United States to the contrary notwithstanding." The act also required the boats navigating the Ohio River not to interfere with the bridge as constructed, and required them to lower their smokestacks, so that they could pass under the bridge without interfering with it.

Prior to the decision of the Supreme Court in *Wabash, St. Louis & Pacific R. R. Co. v. Illinois*,<sup>47</sup> decided October 25, 1886, the court in the famous Granger Cases had apparently held that it was competent for the state of Illinois to impose certain taxes which constituted a burden upon interstate commerce. Congress had then never legislated upon this subject. The Interstate Commerce Commission by which the control of Congress was asserted over interstate carriers was created by an Act of Congress passed in 1887.<sup>48</sup> But the majority opinion of the Supreme Court in the *Wabash Railroad Case* written by Mr. Justice Miller, concluded with these words:

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43. *United States v. Steffens*, 100 U. S. 182.

44. 13 How. 519.

45. *Lives and Services of the Chief Justices*, 529.

46. 10 Statutes at Large, 112.

47. 118 U. S. 557.

48. 3 U. S. Compiled Statutes, 1901, p. 3153.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the state, it may be very just and equitable, and it certainly is the province of the state legislature to determine that question. But when it is attempted to apply to transportation through an entire series of states a principle of this kind, and each one of the states shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the states and upon the transit of goods through those states cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.<sup>49</sup>

And the Supreme Court in that case went "in advance of popular recognition" of the sovereign power of Congress to regulate a subject over which the state of Illinois had sought to exercise control, and in effect called upon Congress to act.

But the suggestion may be made that the Supreme Court has said that insurance is not commerce.<sup>50</sup> The so-called Insurance Cases do not, however, bar Federal control of insurance; for, in the first place with the exception of the *Cravens Case*, they involved the validity of state statutes imposing terms under the police power, upon corporations of other states, which is quite a different thing from the exercise of Federal power by Congressional legislation.

In the *Cravens Case* the question was, whether a statute of Missouri, providing for the non-forfeiture of a policy of life insurance under certain conditions, fixed the rights of the parties contrary to the provisions of the contract as written.

In the second place, all the cases of the series subsequent to *Paul v. Virginia*, accept, without question, the dictum of Mr. Justice Field, and wholly upon that dictum rests the theory that insurance is not commerce.

In the third place, *Paul v. Virginia* and the succeeding cases of that series are not binding upon either the Supreme Court or Congress because the doctrine of *stare decisis* is inapplicable in constitutional questions, and, though Mr. Justice Brewer, off the bench,

49. 118 U. S. 557.

50. *Paul v. Virginia*, 8 Wall. 168 (1868); *Liverpool Ins. Co. v. Mass.* 10 Wall. 566 (1870); *Hooper v. California*, 155 U. S. 648 (1894); *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1899); *Nutting v. Mass.*, 183 U. S. 553 (1901).

expressed the opinion that insurance "is not a part of interstate commerce and only a matter of local law,"<sup>51</sup> he would, as a member of the court, probably recognize the truth and force of what he said in the opening sentences of the very address in which he made that statement with respect to insurance, viz: that the court has the power—and if it has the power, it certainly has the duty—to "*incarnate* into the constitutional life of the nation the thoughts and beliefs of the people" with whom insurance is, in fact, interstate commerce, despite all theories to the contrary.

It is sometimes urged that Marshall and his associates were free and untrammelled by precedent and that, moreover, they had the benefit of actual knowledge of the intentions of the framers of the Constitution, but that now the Constitution must receive a more literal interpretation. But "the letter killeth." Moreover, though Marshall had the advantage of participation in the discussion which preceded the adoption of the Constitution, the court, as it is at present constituted, is just as free and untrammelled with respect to its judgments on constitutional law as in the days of Marshall; for, as already stated, the court does not consider itself bound by its previous expression of opinion on constitutional questions. There is no reason to assume that the court will not continue to accept and assert as sound and reasonable the doctrine stated in the *Debs* Case.<sup>52</sup>

The Constitution has not changed. *The power is the same.* But it operates to-day upon modes of interstate commerce unknown to the fathers; and it will operate with equal force upon any new mode of such commerce which the future may develop.

And this is so because the Constitution states *principles* susceptible of wide application and *not rules* intended to govern only in special cases.

Before the promulgation of the Justinian Code, there were those who, in the language of the late James C. Carter, made "a fêtitish of the doctrine of *stare decisis*," and to prevent the perpetuation of judicial error, the Justinian Code<sup>53</sup> gave this direction to the judges of that day:

Let no judge or arbiter suppose that he must follow decisions which he does not believe were rightly adjudged, much less the sentences of the most eminent prefects or other high magistrates, for if a case is not well decided, it ought not to be extended into a fault of other judges, since judgments are to be rendered not according to examples, but according to laws.

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51. Address: Two Periods in the History of the Supreme Court.

52. 158 U. S. 591.

53. Book VII, Title 45, Section 13.

And the Supreme Court, upon great consideration, stated the following rule in the Income Tax Cases:<sup>54</sup>

The doctrine of *stare decisis* is a salutary one, and is to be adhered to on proper occasions in respect of decisions directly upon points in issue, but this court should not extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

On the argument of that case it was contended that certain previous decisions of the court foreclosed the matter under consideration; but the following language of Mr. Chief Justice Marshall<sup>55</sup> was quoted by the court as a conclusive answer to such contention:

It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

The chief justice, in his opinion in the Income Tax Cases, also quoted the apt language of Mr. Chief Justice Taney from *The Genesee Chief*,<sup>56</sup> decided in 1851, in which it was held that certain waters were within "the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted," overruling the preceding case of *The Thomas Jefferson*.<sup>57</sup>

It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that if we follow it we follow an erroneous decision into which the court fell when the great importance of the question, as it now presents itself, could not be foreseen, and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825 when the commerce on the rivers of the West and on the lakes was in its infancy and of little importance, and but little regarded compared with that of the present day. . . . The case of *The Thomas Jefferson* did not decide any question of property or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. For everyone would suppose that, after the decision of this

54. *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429.

55. *Cohens v. Virginia*, 6 Wheat. 264, 399.

56. 12 How. 443, 455.

57. 10 Wheat. 428.

court, in a matter of that kind, he might safely enter into contracts upon the faith that rights thus acquired would not be disturbed. In such a case *stare decisis* is the safe and established rule of judicial policy and should always be adhered to. . . . But the decision referred to has no relation to rights of property.

The language quoted is singularly appropriate, not only to the Insurance Cases, but to any proposed adaptation of the commerce clause to present conditions, and Mr. Chief Justice Fuller concludes his observation with respect to the doctrine of *stare decisis* as follows:

Manifestly, as this court is clothed with the power and entrusted with the duty to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

No one has put the whole matter so clearly as the late James Bradley Thayer who said:

We must disentangle views of political theory, political morals, constitutional policy, and doctrines as to that convenient refuge for loose thinking which is vaguely called the "spirit" of the Constitution, from doctrines of constitutional law. Very often this is not carefully and consistently done. And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution,—of what people have been imagining and putting forward as the Constitution. . . . That instrument, astonishingly well adapted for the purposes of a great, developing nation, shows its wisdom mainly in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations. As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies, as if it were always ready to give way under pressure, and as if statesmen were always standing ready to violate it when an important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought.<sup>58</sup>

Ralph W. Breckenridge.

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58. Our New Possessions, XII, *Harvard Law Review*, 468.